OPINION OF ADVOCATE GENERAL TESAURO
delivered on 13 December 1994 *

1. In this action, the European Parliament seeks the annulment of Council Regulation (EEC) No 3917/92 of 21 December 1992 extending into 1993 the application of Regulations (EEC) Nos 3831/90, 3832/90, 3833/90, 3834/90, 3835/90 and 3900/91 applying generalized tariff preferences for 1991 in respect of certain products originating in developing countries, and adding to the list of beneficiaries of such preferences, [1] on the ground that it was adopted without first consulting the Parliament as required by the Treaty.

To justify its action, the Council has argued that the public interest urgently required the measure in question to be adopted not later than a certain date, and that it proved impossible, notwithstanding concerted efforts, to obtain the necessary opinion of the Parliament in time. It is therefore necessary to determine whether the Council may, in exceptional circumstances, adopt a legislative measure without the Parliament's opinion in a case where the Treaty provides that such consultation is obligatory, or whether a measure adopted in that way is unlawful.

At issue therefore is the institutional balance intended by the Treaty, which requires that, in exercising its own powers, an institution must respect the limits on those attributed to the other institutions.

2. For a better understanding of the parties' arguments, it will be helpful to recall briefly how, and in accordance with what timescale, the regulation in question came to be adopted.

As is well known, the purpose of generalized tariff preferences is to allow a range of industrial and agricultural products from developing countries, generally within preordained quantitative limits, to have access to the Community market wholly or partially free of customs duties. That system was introduced in 1971, in accordance with an offer made by the Community within the United Nations Conference on Trade and Development (UNCTAD). Initially intended to last ten years, its duration was subsequently extended until 1990. At that date, however, although a wholesale review of the system appeared to be necessary, it was not considered possible to proceed with it before the end of the Uruguay Round negotiations on

* Original language: Italian.

1 — OJ 1992 L 396, p. 1.

the liberalization of world trade. In the meantime, because of that delay, the existing system was extended annually on a provisional basis and limited adaptations were made, having regard to the development of the international and Community economic situation.

3. In that context, the Commission proposed to the Council, once again, that the system in force be extended until 31 December 1993. However, the proposal included a number of new countries in the list of beneficiaries, partly in order to take account of developments in the former USSR, and partly to align the Community list of the least developed countries with that of the United Nations. In view of the introduction of the single market, the Commission also suggested replacing the tariff quotas divided among the Member States by fixed duty-free amounts for the whole Community.

In a letter of *22 October 1992*, the General Secretary of the Council informed the President of the Parliament that the Council had decided that day to consult the Parliament on the proposal in question, which was based on Articles 43 and 113 of the Treaty, and requested that the matter be treated as urgent as provided for by Rule 75 of the Rules of Procedure of the European Parliament. [2] The reason stated for the urgency was the need to adopt the regulation *before 1 January 1993*, the date on which it was intended to come into effect.

4. At the Parliament's sitting of *30 October 1992* the proposal was referred to the Committee on Development for detailed consideration and to four other committees for their opinion.

On *17 November 1992* the Parliament decided in plenary session to debate the proposal as a matter of urgency, and to consider it on *20 November 1992*. On that date, however, the Chairman of the Committee on Development took the view, in particular, that the entry of East European countries on the list of beneficiaries of generalized preferences significantly altered the Community concept of developing countries and requested that the proposal be referred back to committee for further examination.

2 — Article 75, which became Article 97 after the Parliament amended its Rules of Procedure on 15 September 1993, provides as follows:
'1. A request that a debate on a proposal on which Parliament has been consulted (...) be treated as urgent may be made to Parliament by the President, by a committee, by at least twenty-three Members, by the Commission or by the Council. This request shall be made in writing and supported by reasons.
2. As soon as the President has received a request for urgent debate, he shall inform Parliament thereof; the vote on that request shall be taken at the beginning of the sitting following that during which notification was given of the request (...)'

Consideration of the Committee on Development's report was thus placed on the agenda for the plenary session of *18 December 1992*. At that session, however, before discussion of the matter had started, the President received a request for the sitting to be adjourned pursuant to Rule 106 of the Rules of Procedure. [3] Parliament agreed to the request, with the result that discussion of the remaining matters on the agenda, including the resolution proposed by the Committee on Development, was postponed until 18 January 1993.

5. It became clear in the consultations which followed between the offices of the General Secretary of the Council and the President of the Parliament that it would be impossible to convene an extraordinary session of the Parliament before the end of 1992. On *21 December 1992*, therefore, the Council adopted the contested regulation, stating the reasons for failure to consult the Parliament in the following terms:

'Whereas it is imperative to avoid a legal vacuum that could seriously harm the Community's relations with the developing countries as well as the interests of economic operators; whereas, therefore, the regulation on the application in 1993 of the Community's regime of generalized tariff preferences must be adopted sufficiently early to enable it to enter into force on 1 January 1993;

Whereas it appears, after consultation of the President of the European Parliament, that it would be impossible to hold an extraordinary session of the European Parliament to enable it to adopt its opinion in good time to allow the adoption and publication of the regulation before the end of 1992;

Whereas, in these exceptional circumstances, the regulation should be adopted in the absence of an opinion of the European Parliament'.

The Parliament was informed of the adoption of the regulation by a letter of the same day.

6. On *18 January 1993* the Parliament examined the Committee on Development's proposal for a resolution and approved the draft regulation already adopted, but proposed 17 amendments and requested the Council to consult it again in the event of substantial modifications to the approved text.

3 — That rule provides:
'The sitting may be closed during a debate or a vote if Parliament so decides on a proposal from the President or at the request of the chairman of a political group or at least 13 Members.'

7. Finally, the regulation in question was published in the *Official Journal of the European Communities* No L 396 of 31 December 1992, but the Journal was not in fact issued by the Publications Office until *28 January 1993*. It is to the latter date, therefore, that reference must be made for its entry into force. However, it was from 1 January 1993 that the regulation was made to take effect.

8. In the light of the above, the Parliament seeks the annulment of the contested regulation. In support of its claim, it first cites the 'Isoglucose' cases, which state that the obligation to consult the Parliament, where provision for such consultation is made, is 'constitutional' in character, inasmuch as it represents an essential factor in the institutional balance intended by the Treaty. [4] Consultation of the Parliament therefore constitutes an essential 'formal' requirement, disregard of which renders the measure adopted void. In that regard, the judgments state that 'observance of that requirement implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion.' [5]

9. The Parliament bases its contentions on two lines of argument in particular.

First, the Council purported to set a time-limit on the consultation period without being empowered to do so by the relevant provisions of the Treaty. That was certainly not the purpose of the facility granted to the Council to request the Parliament to examine a proposal under the urgency procedure by virtue of Rule 75 of its internal rules, or to convene an extraordinary session under Article 139 of the Treaty. In both cases, the Parliament's right to assess the situation differently from the Council and to find that alleged grounds of urgency do not exist remain unaffected. It is, moreover, beyond dispute that no time-limit is fixed for the formulation of the opinion and, therefore, there is no obligation on the Parliament to act within the time indicated or to do so in an extraordinary session.

10. In the present case, moreover, the Council has not even demonstrated that action was urgent in order to avoid a legal vacuum. In fact there was no obligation to adopt the contested regulation before the end of 1992, as the defendant alleges. The suspension, under the generalized preference system, of customs duties laid down in the Common Customs Tariff, is merely an option which the Community may exercise in favour of developing countries, but without being legally obliged to do so. That is confirmed by the preamble to the four main regulations of 1990 that were extended, which stress the 'temporary and non-binding nature of the

4 — The two judgments in question are those in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, especially paragraphs 32 to 37, and Case 139/79 *Maizena* v *Council* [1980] ECR 3393, especially paragraphs 33 to 38.

5 — Ibid., paragraphs 33-34 and 34-35 respectively.

system' and the possibility of its revocation *at any time*. [6]

11. In its argument, the Council has not questioned the status of Parliamentary consultation as an essential formal requirement. [7] It maintains, however, that in exceptional cases and on certain conditions, it should be permitted to adopt an urgent legislative measure, on a proposal from the Commission, even without the prescribed opinion of the Parliament.

It cannot be denied that power, in particular, in circumstances where the Council's authority is in some way constrained or a public interest of particular importance makes it necessary or justifiable to adopt a measure and, notwithstanding a request made to the Parliament to examine a proposal under the urgency procedure or in an extraordinary session, it nevertheless proves impossible to obtain the opinion within the time-limits imposed in the Community interest.

In other words, where it has exhausted without success all the procedural means at its disposal in order to obtain the prior opinion of the Parliament, the Council maintains that impossibility to consult cannot prevent it from exercising its final decision-making power; in that way, paralysis of the Community decision-making process is avoided. That, the Council submits, is the correct reading of the 'Isoglucose' judgments, [8] which annulled the regulation at issue in that case because, in contrast with the present case, the Council had not availed itself of all the possibilities for obtaining the opinion in good time.

12. Turning to the Parliament's second line of argument, the Council maintains that the urgency and the need to act before a certain date are apparent from the fact that a regulation establishing general preferences produces three-way effects: in relation to developing countries, for which the system constitutes the principal means of aid in the field of trade; in relation to economic operators in Member States, who use the quantitative limits laid down therein when importing from those countries and who base their commercial organization also on their ability to use the preferences from

6 — See the fifth recital in the preamble to Council Regulation (EEC) No 3831/90 of 20 December 1990 applying generalized tariff preferences for 1991 in respect of certain industrial products originating in developing countries (OJ 1990 L 370, p. 1); the fifth recital in the preamble to Council Regulation (EEC) No 3832/90 of 20 December 1990 applying generalized tariff preferences for 1991 in respect of textile products originating in developing countries (OJ 1990 L 370, p. 39); the fourth recital in the preamble to Council Regulation (EEC) No 3833/90 of 20 December 1990 applying generalized tariff preferences for 1991 in respect of certain agricultural products originating in developing countries (OJ 1990 L 370, p. 86); and the eighth recital in the preamble to Council Regulation (EEC) No 3834/90 of 20 December 1990 reducing for 1991 the levies on certain agricultural products originating in developing countries (OJ 1990 L 370, p. 121).

7 — In its rejoinder, the Council raises doubts as to the need to consult the Parliament in the present case, inasmuch as, since the regulation fell solely within the Community's commercial policy, it ought properly to have been based on Article 113 of the Treaty alone. However, without entering into the merits of the question, I do not believe that a problem concerning the legal basis of the regulation may be raised by the Council at this stage of the proceedings, especially since reference to Article 43 was already made in the proposal which the Council itself submitted for consultation.

8 — See footnote 4.

the first day of the year; and, finally, in relation to the customs authorities, who need a certain amount of time in order to put the necessary procedures in place for giving effect to the quantitative limits fixed by the regulation in question.

A legal vacuum in the Community system of generalized preferences, resulting from any delay in adopting the measure providing for them, would therefore cause tangible damage to the exports of beneficiary non-member countries and also to economic operators in the Member States, who would be deprived of a legal instrument on which they were entitled to rely in planning their activities. That could involve the Council in liability, or at least leave it open to a declaration of failure to act. Moreover, as already indicated in the preamble to the regulation, a legal vacuum of that kind would also risk seriously harming the Community's relations with the developing countries.

13. Finally, the Council does not consider it would have been appropriate, as the Parliament suggests, to renew the existing 1992 scheme, without amendment, for a short period pending its opinion. Such a renewal, even for a short time, would have been possible only on a proposal by the Commission and on the same legal bases as those used for the final regulation, and would, likewise, have necessitated consultation with the Parliament.

14. Having thus summarized the positions of the parties, let me say at once that I cannot subscribe to the Council's argument whereby it may, albeit in exceptional circumstances, adopt a legislative measure without awaiting the outcome of a consultation of the Parliament which is obligatory under the Treaty. Even if, to take an absurd view, that argument were to be accepted, I still consider that in the present case the overriding urgency which would justify such a serious departure from the rules laid down by the Treaty has not been sufficiently proven.

15. In the first place, I do not think arguments in favour of the Council can be deduced from the 'Isoglucose' judgments, which have frequently been referred to. On that occasion, the Court was emphatic that the consultation procedure, where provided for by the Treaty, 'is the means which allows the Parliament to play an actual part in the legislative process of the Community. (...) Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.' [9]

Having thus established that consultation is an essential formal requirement, as has already been noted above, the Court did not find it necessary in the circumstances of the case to examine the validity of the Council's

9 — Judgments in *Roquette Frères* and *Maizena*, cited above, paragraphs 33 and 34 respectively.

argument that the Parliament could not rely on failure to observe that requirement in circumstances where, by its own conduct, it had made observance impossible. However, since not all the means for obtaining the prior opinion of the Parliament had been exhausted, the regulation at issue in the 'Isoglucose' cases was annulled *'without prejudice to the questions of principle raised by [the] argument of the Council'*. [10]

16. The 'Isoglucose' judgments clearly stated that compliance with the obligation to consult the Parliament in the cases prescribed by the Treaty implies that a lawful measure cannot be adopted unless an opinion on it is obtained first. The question whether, in exceptional circumstances such as the need for urgent action or a refusal to give the opinion requested, the Council is authorized to adopt a given measure without awaiting the outcome of the consultation [11] has also been answered sufficiently clearly in the subsequent case-law of the Court.

17. Let me recall, first, the judgment in Case 68/86 *United Kingdom* v *Council*, [12] where the Court held that it was not possible, by a directive, to alter the provisions concerning the Council's detailed voting procedures in order subsequently to adopt a series of measures in a given area, since 'the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves'. Needless to say, the provisions concerning the Parliament's participation in the legislative process form part of those rules.

In that context, the Court has acknowledged that participation in the Community legislative process, in the cases provided for and in the forms laid down by the Treaty, comes within the Parliament's prerogatives, and has therefore attributed to the Parliament the power to bring an action for the annulment of a measure adopted by the Council and the Commission in breach of those prerogatives. [13] The latter are infringed particularly if the Council adopts a measure on a legal basis which does not provide for prior consultation of the Parliament, whereas the measure concerned should have been adopted under a provision of the Treaty which provides for such consultation. In such a case, it is irrelevant that optional consultation may nevertheless have taken place, since compliance with the procedure provided for by the Treaty may in no circumstances be left to the discretion of the institution enacting the measure. [14]

18. With the same end in view, namely the constitutional safeguarding of the specific

10 — Ibid., paragraph 36. My italics.

11 — Even those authors who are inclined to attribute such power to the Council recognize that the 'Isoglucose' judgments leave the question open: see, in that respect, Wyatt & Dashwood: *'European Community Law'*, London, 1993, pp. 37 and 38.

12 — [1988] ECR 855, especially paragraphs 37 and 38.

13 — Judgment in Case C-70/88 *Parliament* v *Council* [1990] I-2041.

14 — Judgment in Case C-316/91 *Parliament* v *Council* [1994] ECR I-625, especially paragraphs 12 to 17.

function attributed to the Parliament in the Community's institutional structure, and, more particularly, its effective participation in the legislative process, recognition has also been given to the Parliament's right to be reconsulted whenever the text finally adopted by the Council departs in substance from that on which the Parliament has already been consulted. [15] When consultation is obligatory, therefore, the Parliament's opinion must be accorded due regard and the Parliament must be granted the necessary time to study the Commission's proposal and express an informed view. [16]

19. The central feature of this case-law, which is quite unambiguous, is the Court's constant attention to the rigorous preservation of the institutional balance, as it has gradually evolved following amendments to the original text of the treaties. It is precisely in order to ensure that balance, by means of an adequate and consistent system of legal protection, taking particular account of the progressive strengthening of the Parliament's role, especially in the legislative process, that the Court has repeatedly affirmed the latter's right to bring legal proceedings. [17]

20. That fits the logic of the system perfectly and is a natural consequence of the fact, recognized by the Court, that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'. [18] The rules on the relations between the institutions and on the corresponding distribution of powers clearly constitute one of the essential components of that constitution, and derogations from them cannot be made without thereby altering the characteristics of the system.

To accept the Council's argument in this case, namely that it be given the power, even if only in exceptional cases, to adopt a regulation without the prescribed opinion of the Parliament, would in practice be to permit a derogation from the rules on the formation of Community acts without provision for it being made in the Treaty, and thus to permit an alteration in the institutional balance outside the procedures and forms laid down for revision of the 'constitutional charter'. The rules are of course capable of change, and special mechanisms might be introduced to allow legislation to be passed as a matter of urgency; since, however, as the Court has repeated with growing emphasis, this is a Community based on the rule of law, I con-

15 — Judgment in Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraph 16. For earlier authority, see the judgment in Case 817/79 *Buyl* [1982] ECR 245, paragraphs 14 to 24.

16 — See the Opinion of Advocate General Jacobs in Case C-316/91 *Parliament* v *Council*, cited in footnote 14 above.

17 — Since the case-law is well-known, I refer here only to the judgment in Case 13/83 *Parliament* v *Council* [1985] ECR 1513, which recognized the Parliament's right to bring an action under Article 175 for failure to act, and the judgment in Case C-70/88, cited in footnote 13 above, in which, as already stated, the Parliament was allowed to bring an action for annulment under Article 173.

18 — See the judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, especially paragraphs 23 and 24. That principle has often been repeated by the Court: see most recently, and with reference to the Parliament, the judgment in Case C-314/91 *Weber* v *Parliament* [1993] I-1093, paragraph 8.

sider that such an alteration of the rules is a matter for the constitutional legislature alone. [19]

21. Significantly, such a possibility is today expressly provided for by Article 228 of the Treaty, but as a result of a change introduced by the Treaty on European Union; henceforth, when an opinion is to be formulated on an international agreement, the Council may impose a time-limit on the Parliament, according to the urgency of the matter; if the time-limit passes without such opinion being given, the Council may act. The point to note is that the attribution of such a power in a specific case in fact required the revision of the corresponding provision in the Treaty.

22. Nor am I swayed by the United Kingdom's argument, to the effect that the system makes it possible to impose a time-limit on the Parliament for the formulation of its opinion in the context of the consultation procedure. The United Kingdom argues that, when the cooperation procedure under Article 149(2) and (3) of the Treaty (now Article 189c, following amendments introduced by the Maastricht Treaty) is to be applied, the Council may definitively adopt an act if the Parliament has not taken a decision within three months of the communication to it of the common position of the Council. Since the aim of that procedure is to strengthen the Parliament's participation in the Community legislative process, it would be paradoxical to allow a situation in which, within the sphere of mere consultation, the Parliament ended up wielding a more decisive power of intervention, capable in fact of blocking an act, precisely because of the impossibility of imposing a time-limit on such consultation.

I would merely observe, as the Parliament has rightly objected, that the comparison can at most be made between the consultation procedure and the *first stage* of the cooperation procedure, in the course of which the Parliament is called upon to express its opinion on the Commission's proposal; in that regard, significantly, no time-limit has been laid down. In the second stage, which has particular characteristics of its own, *all* the institutions are, by contrast, required to comply with a time-limit for their deliberations, including the Council, [20] whose failure to take a decision within the prescribed time-limit entails 'non-adoption' of the act.

23. That does not mean that the Council has no possibility of invoking any sanctions against the Parliament's failure to act. An

19 — The question concerning the limits which the Court may not exceed in interpreting and applying the rules laid down by the Treaty, for fear of encroaching upon an area reserved for the 'constitutional' legislature, is put very clearly in Advocate General Van Gerven's Opinion in Case C-70/88, cited in footnote 13.

20 — Except where, on the second reading, the Parliament has approved the Council's common position expressly or by implication (by not taking a decision within the three-month time-limit), in which case it was deemed unnecessary to impose a time-limit on the Council, which, in that event, 'shall definitively adopt the act in question in accordance with the common position' (Article 189c(b)).

adequate and complete system of legal protection would not be assured if the conflict of powers mechanism could not be used in such cases. The possibility of bringing an action against the Parliament for failure to act was already apparent from a systematic and progressive interpretation of Article 175 as it previously stood. [21] Moreover, any doubt on the point has now been removed, as that possibility is expressly contemplated in Article 175 as amended by the Maastricht Treaty on European Union.

I do not thereby intend to deny that, in cases of urgency, such a remedy might prove ineffective. As I have already said, however, a different solution would require an amendment of the rules which govern the balance between the institutions, and which the Court has always held, and rightly held, to have constitutional force. Such an amendment is therefore a matter for the legislature, and not for the Court.

In the light of the foregoing, I consider that the Parliament's action should be upheld.

21 — See the Opinion of Advocate General Darmon in Case C-41/92 *The Liberal Democrats* v *Parliament* [1993] ECR I-3153. I do not, therefore, agree with the Council's argument, which excluded that possibility in its pleadings. I do not consider it would be helpful to dwell on the question any longer, as it has no further relevance following the amendments to Article 175 by the Maastricht Treaty.

24. Even if, as a matter of principle, the Court were not to accept that solution, the result cannot be any different on the facts of the case. In my opinion, the Council has not succeeded in establishing the existence of a Community public interest, the safeguarding of which made it impossible to delay the adoption of the contested regulation beyond a certain date.

In that respect, the Council argues that any delay in acting would have created a *legal vacuum* in the Community system of generalized tariff preferences, which has always been renewed since its first application in 1971, and would also have been incompatible with the principle of *legal certainty*.

25. So far as concerns the first argument, the Council points to the Community's undertaking within UNCTAD, referred to at the beginning of this Opinion, which, although not translated into a formal agreement and obligations on the part of the countries granting customs preferences, has given rise to a practice continuously followed for over twenty years. The Council argues that the granting countries cannot alter such a practice unilaterally without prior discussion. In a declaration of 1990, moreover, the Council had confirmed the Community's undertaking to retain the system of generalized preferences until the year 2000. As regards the countries included in the list of beneficiaries for the first time, it is undisputed that no

undertaking was given to them. However, as from the time they faced difficulties similar to those of States which were already beneficiaries of generalized preferences, the Community had a duty to include them in the list, and both the States in question and the economic operators concerned were well aware of that.

26. In my view, the Council's arguments on that point are entirely lacking in substance. Whilst they doubtless serve to illustrate the reasons for the contested rules and their political expediency, they are quite inappropriate for the purpose of justifying the necessity of departing from the Treaty provisions concerning the manner in which the Community institutions express their will. In fact the delay in the contested regulation's entry into force could not entail any risk of a 'legal vacuum', if by that expression is meant those situations in which facts or relationships, although legally significant, lack a legal framework. Since the system of generalized preferences essentially consists in the suspension of the customs duties set out in the Common Customs Tariff, [22] the consequence of failure to adopt, or merely delay in adopting, the regulation providing for those preferences is that the Common Customs Tariff will also apply to products which come from countries that are beneficiaries of the system. Moreover, since generalized preferences constitute a special regime, the ordinary regime for imports from non-member countries will apply in its absence. That, furthermore, is what normally happens once the amounts in respect of which suspension of the customs duties was granted, are exhausted.

27. Nor would the situation be any different if the Community were deemed to be internationally obliged to apply the tariff preferences to certain developing countries. In the first place, the Council itself recognizes that there is no legal obligation here in the strict sense. In addition, the regulations which the contested regulation was to extend expressly provide that the system is not binding. [23] Moreover, even if such an obligation were found to exist, failure to adopt the annual system of generalized tariff preferences, or delay in adopting it, could at most involve the *international* liability of the Community, and could certainly not establish a vacuum in its legal system. In any event, such liability could not justify an infringement of *internal, 'constitutional'* rules on the distribution of powers between the institutions.

28. There is no more substance in the Council's arguments that the protection of legal

22 — See the judgment in Case 51/87 *Commission* v *Council* [1988] ECR 5459, especially paragraph 2.

23 — See the references in footnote 6.

certainty or of legitimate expectations required the contested act to be adopted by a certain date. In that regard, as already mentioned, the Council argues that the economic operators concerned and the beneficiary countries had good reason to expect that the scheme of generalized preferences would be extended for 1993. There was nothing to suggest that the system might be dismantled or blocked without warning. Moreover, whilst tariff preferences are capable of suspension or modification at any time, a situation which economic operators could certainly not have expected to have to face, according to the Council, was that which threatened to arise at the beginning of 1993, namely a situation of uncertainty as to the date on which the contested regulation would enter into force and as to the possibility of making the necessary customs declarations.

29. In my opinion, the reference to the principle of legal certainty is not relevant. If the concept conveys the notion that there must be no doubt as to the law applicable at a given time in a given area, [24] there can have been no such doubt in the present case. The duration of the generalized preferences scheme for 1992 was expressly limited to 31 December of that year, so that non-renewal, or delayed renewal, of the special scheme for the following year could, as I have already said, mean only that the Common Customs Tariff applied. Moreover, non-adoption or delayed adoption of the contested regulation would not in any way have called into question situations and relationships regulated under the scheme previously in force, any more than, on the occasion of previous extensions, it arose on the removal of any given country from the list of beneficiaries in relation to wholly or partially duty-free exports of products which it had made before such removal.

30. The argument based on the protection of the legitimate expectations of economic operators is open to the same criticism. The Council itself acknowledges not only the temporary nature of the system but also its natural *expiry each year*, imposed by the necessity for periodic adaptations to its content and to the scope of the preferences granted by reference to the economic development of the beneficiary countries and the state of the market for the products concerned, and also by the need for alterations to the Common Customs Tariff. Leaving aside the fact that, in the present case, there was no question of dismantling the system, the Court has consistently held that traders cannot expect an existing situation which is capable of being altered by the Community

24 — See the clear definition given by Advocate General Mischo in his Opinion in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, p. 4043.

institutions in the exercise of their discretionary power to be maintained. [25] That cannot fail to be the case, in particular, with advantages which such persons have been able to enjoy under the generalized preferences scheme, which, as has already been stated, is subject to constant amendment.

31. It has therefore not been proven that overriding urgency dictated that the contested regulation should be adopted by a certain date and thus entitled the Council not to await the outcome of the consultation with the Parliament. Moreover, whilst it is not without significance that the Council would in any event have been able to request the convening of an extraordinary session of the same Parliament for the beginning of January 1993, the latter gave the opinion requested with a 'delay' of only three weeks anyway.

That raises a decisive point. Even accepting the need (or the expediency) for the regulation to enter into force on 1 January 1993, it would have been quite possible, in compliance with the procedures laid down by the Treaty, for it to take effect from that date. Although, generally speaking, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected. [26]

32. The Council's counter-argument, to the effect that subsequent regularization of customs declarations made in the period between 1 January and the date of the regulation's actual entry into force would pose insurmountable technical and legal problems, is belied by the fact that that is precisely what has happened in practice; the regulation was not published and distributed until *28 January 1993*. The Court has consistently held that 'a regulation must be regarded as published throughout the Community on the date borne by the issue of the Official Journal containing the text of that regulation. However, should evidence be produced that the date on which an issue was in fact available does not correspond to the date which appears on that issue, regard must be had to the date of actual publication.' [27] It is therefore indisputable that the application of the act in question has in any case been retroactive. Nor does it seem to me that those 'insurmountable' difficulties in regularizing customs declarations after the event could

25 — See, most recently, the judgment in Case C-353/92 *Greece* v *Council* [1994] ECR I-3411, especially paragraphs 43 to 48.

26 — See, most recently, the judgment in Joined Cases C-260/91 and C-261/91 *Diversinte* and *Iberlacta* [1993] I-1885, paragraph 9.

27 — See, for example, the judgment in Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 12.

have been overcome in this case, as the Council argued at the hearing, given the possibility at any time of informal contacts between the relevant officers of the Community and the national customs authorities.

33. Moreover, the circumstance just referred to is significant for a further reason, and illustrates the paradoxical nature of the situation on which the Court is asked to give a ruling. It would be unreasonable if overriding urgency and the need to safeguard a fundamental Community interest enabled the Council to adopt a regulation in breach of the Parliament's 'constitutional' prerogatives, whilst, at the same time, those same conditions were not imposed on the administration entrusted with the publication of acts, which may instead quietly proceed with their publication a month after the date, alleged to be 'imperative', on which the regulation in question was adopted and entered into force.

In short, the circumstances of this case border on the farcical. Let the facts, pure and simple, speak for themselves. We are told that the act — which, it should be noted, is not a mere routine measure, but contains an amendment to the class of the system's beneficiaries which is of clear political significance — must enter into force on 1 January and no later, and that to that categorical imperative nothing less than obligatory consultation of the Parliament, which the Court has held to have constitutional force, has to be sacrificed. And yet the regulation cannot be brought into force on that date, because publication times slip until 28 January for reasons of organization or the like.

At the end of the day, the act had to be given retrospective effect anyway, a solution which could well have been adopted so as to respect the constitutional prerogatives of the Parliament as well, and not just to comply with the timetable for printing.

34. In the event of the Court annulling the regulation in question, I consider nevertheless that it should make use of its power under the second paragraph of Article 174 of the Treaty, whereby, if it considers it appropriate to do so, it may state 'which of the effects of the regulation which it has declared void shall be considered as definitive'. Since the validity of the contested regulation was limited to 1993, the remedy for procedural defects in the formulation of the act is annulment, but the opinion actually given shows that the Parliament also agreed with the substance of the measures adopted, I consider that overriding considerations of legal certainty preclude implementing measures taken on the basis of that regulation from being called into question. [28]

28 — See the judgment in Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781, paragraphs 23 and 24, and the judgment in Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraphs 22 to 24.

35. In the light of the foregoing considerations, therefore, I propose that the Court should:

1. annul Council Regulation (EEC) No 3917/92 of 21 December 1992 extending into 1993 the application of Regulations (EEC) No 3831/90, (EEC) No 3832/90, (EEC) No 3833/90, (EEC) No 3834/90, (EEC) No 3835/90 and (EEC) No 3900/91 applying generalized tariff preferences for 1991 in respect of certain products originating in developing countries, and adding to the list of beneficiaries of such preferences;

2. leave the effects of that regulation intact;

3. order the Council to pay the costs.